ORIGINAL

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554





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| In the Matter of | ) | |
| | ) | |
| Amendment of Parts 21 and 74 To Enable | ) | MM Docket No. 97-217 |
| Multipoint Distribution Service and | ) | |
| Instructional Fixed Television Fixed | ) | File No. RM-9060 |
| Service Licensees To Engage In Fixed | ) | |
| Two-Way Transmissions | ) | |

# REPLY COMMENTS

T. Lauriston Hardin, P.E.
George W. Harter, III
HARDIN & ASSOCIATES, INC.
1300 Diamond Springs Rd., Suite 600
Virginia Beach, VA 23455
(757) 464-1817

S. Merrill Weiss
MERRILL WEISS GROUP
908 Oak Tree Avenue, Suite A
South Plainfield, NJ 07080-5100
(908) 226-8880

Technical Consultants to the Petitioners

Paul J. Sinderbrand, Esq.
William W. Huber, Esq.
WILKINSON, BARKER, KNAUER & QUINN, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037-1128
(202) 783-4141

Counsel to the Petitioners

February 9, 1998

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## EXECUTIVE SUMMARY

The comments submitted in response to the *NPRM* demonstrate overwhelming support for the adoption of innovative new MDS and ITFS rules that will both enhance the ability of MDS and ITFS licensees to more productively employ their spectrum and will permit them to do so without the application processing delays that have plagued those services.

The Petitioners detailed in their Comments how adoption of the proposed rule changes will permit wireless cable operators to respond to increasing competitive pressure to provide two-way communications offerings, and will provide educators with a vehicle for providing a variety of enhanced educational services. All of the ITFS entities which filed comments in this proceeding echo this sentiment, uniformly supporting the concept of flexible use of spectrum. While WebCel has sought to frustrate the ability of MDS and ITFS licensees to deploy new technologies flexibly, its efforts should be dismissed as inconsistent with the Commission's policies towards spectrum utilization and a transparent attempt to bolster LMDS spectrum values.

Critical to the Petitioners proposal is the adoption of a new licensing system which would permit the rapid deployment of new services without the delays that have historically hobbled the competitive prospects of the wireless cable industry. To speed the deployment of advanced services, the Commission must radically change existing application processes and institute an expedited application processing program along the lines proposed by the Petitioners. As reflected by the NIA/WCA Joint Proposal, the ITFS community is largely supportive of expediting the processing of ITFS applications, provided that adequate interference protection standards remain in place. As the Petitioners have shown repeatedly, adequate safeguards are embodied in their proposal,

particularly through their advocacy of an absolute requirement that any impermissible harmful electrical interference caused by a facility authorized under the expedited procedures advocated by the Petitioners would have to be cured. In this regard, the Commission should also adopt expedited procedures for the resolution of interference complaints.

Petitioners urge that the Commission maintain a flexible philosophy when addressing issues of ITFS/MDS relations, adopting rules that are minimally intrusive in a manner consistent with the NIA/WCA Joint Proposal. The NIA/WCA Joint Proposal has been carefully crafted to balance the costs and benefits of mandatory provisions in excess capacity leases. The philosophy behind that settlement is that ITFS licensees generally benefit by having the flexibility to negotiate for consideration that best meets local needs, rather than to meet some government mandate. The rules advocated by the NIA/WCA Joint Proposal afford that flexibility, while assuring that ITFS licensees continue to meet the Commission's educational objectives. The imposition of additional requirements beyond those agreed to by NIA and WCA (such as performance bond requirements, mandatory equipment purchase requirements, and the like) upon excess capacity leases will inevitably disrupt that balance, depriving the parties to excess capacity leases of the flexibility to craft arrangements that best meet their needs.

Petitioners underscore the importance of a standardized interference methodology for advanced technology applications. For the most part, Petitioners note that many of the technical concerns raised in the comments and elsewhere in this proceeding have already been addressed in this proposal. In addition, certain minor revisions to the methodology are appropriate to ensure that this methodology will ensure the interference analysis methodology will be sufficiently protective of the rights of incumbent licensees.

Adoption of CTN's newest proposals to address the isolated risk of downconverter overload would unnecessarily hamper the commercial viability of two-way services. There is absolutely no basis for restricting response stations to MDS channels, particularly given the strong demand by ITFS licensees for the ability to use their own channels for response stations. Moreover, given the many competitive alternatives available to the public, any requirement that response station installation be delayed for 30 or more days pending testing would effectively preclude the installation of response stations near ITFS receive sites. Since interference can be controlled without the onerous restrictions CTN proposes, and since the Petitioners have proposed rules under which all BDC overload interference will be cured by the response station licensee, there is no valid reason for adopting CTN's approach.

While several modifications to the methodology proposed in the *NPRM* for calculating the interference potential of response stations are appropriate, the Commission must assure that all interference analyses are conducted utilizing a common approach. The Petitioners have addressed many of the concerns raised regarding the methodology through minor revisions submitted with these reply comments. However, the Commission should reject the proposal by EDX for an extremely simplistic methodology, for the proposal advanced by EDX fails to accurately model the potential for interference from response stations. The Commission also should reject Spike's proposal the applicants have carte blanche in selecting interference prediction methodologies. The benefits of a uniform approach to interference predication far outweigh any benefits of flexibility.

The Commission also should reject the proposal to revise the definition of a response station hub advanced by Spike. The proposed rules provide for the collocation of response station hubs and boosters and the use of common equipment by both types of facilities. To modify the definition as

proposed by Spike would unnecessarily require a significant revision to the hub rules to provide for the prediction of interference from a transmitting hub. Finally, the Commission should reject CTN's suggestion that low power booster stations be denied interference protection. There is no reason cited by CTN and none known to the Petitioners for depriving such facilities of protection against interference.

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## REPLY COMMENTS

The parties listed on Appendix A to the Petition for Rulemaking (the "Petition")[1/] that commenced this proceeding (collectively, the "Petitioners") hereby submit their reply to the comments filed in response to the Commission's October 10, 1997 *Notice of Proposed Rulemaking* ("*NPRM*") soliciting comment on proposals drawn from the Petition for enhancing the ability of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees to use their spectrum more flexibly and efficiently.[2/]

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[1/] *See* Petition for Rulemaking, File No. RM-9060 (filed March 14, 1997) [hereinafter cited as "Petition"].

[2/] *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 97-360, MM Docket No. 97-217 (rel. Oct. 10, 1997) [hereinafter cited as "*NPRM*"]. By *Order Extending Time for Filing Comments and Reply Comments*, the Mass Media Bureau extended the date for filing reply comments until February 9, 1998. *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service And Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, DA 97-2547, MM Docket No. 97-217 (rel. Dec. 5, 1997) [hereinafter cited as "*Extension Order*"].

## I. INTRODUCTION.

The comments submitted in response to the *NPRM* evidence overwhelming support for enhancing the ability of MDS and ITFS licensees to more productively employ their spectrum. Indeed, but for the comments submitted by WebCel Communications, Inc. ("WebCel") in a transparent effort to increase the value of Local Multipoint Distribution Service ("LMDS") authorizations and those filed by the Cellular Phone Taskforce rehashing concerns over RF emissions that were recently discredited by the Commission, every party submitting comments in response to the *NPRM* has supported the concept of affording MDS and ITFS licensees greater flexibility in the use of their spectrum.[3/]

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[3/] *See, e.g.,* Joint Comments of Alliance for Higher Education, *et al.*, MM Docket No. 97-217, at 23 (filed Jan. 8, 1998)("The ITFS Parties generally support the Commission's proposals to authorize two-way communications, cellularization and other flexible technical operations of MMDS and ITFS stations.")[hereinafter cited as "DL&A ITFS Comments"]; Comments of Corporation for Public Broadcasting, Association of America's Public Television Stations, and Public Broadcasting Service, MM Docket No. 97-217, at 1 (filed Jan. 8, 1998)("CPB, APTS and PBS urge the adoption of the proposed rules to allow for greater flexibility in providing two-way [ITFS] transmissions.")[hereinafter cited as "CPB Comments"]; Comments of Public Television 19, Inc., MM Docket No. 97-217, at 8 (filed Jan. 8, 1998)("Public Television 19 encourages the Commission to implement its proposals to enhance the continued educational use of the ITFS spectrum"); Comments of Region IV Educational Service Center, *et al.*, MM Docket No. 97-217, at 2 (filed Jan. 8, 1998)("The ITFS commenting parties recognized that the Commission approached this rulemaking with the intent of establishing the most flexible framework possible, and urge the Commission to stay that course.")[hereinafter cited as "P&C ITFS Comments"]; Comments of National ITFS Ass'n, MM Docket No. 97-217, at 3-4 (filed Jan. 8, 1998)("[NIA] support[s] Petitioner's proposal to enhance the ability of MDS, MMDS, and ITFS licensees to provide two-way communications services through the use of two-way audio, video, and data communications from "response" stations, the use of booster stations in cellular configuration designed to create spectrum flexibility")[hereinafter cited as "NIA Comments"]; Comments of Schwartz, Woods & Miller, MM Docket No. 97-217, at 5 (filed Jan. 8, 1998) ("Commenters believe that the application of two-way interactivity will enhance the effectiveness of ITFS services and will assist ITFS licensees to gain broader acceptance for ITFS as an effective distance learning delivery system.") [hereinafter cited as "SW&M ITFS Comments"]; Comments of Catholic Television Network, MM Docket No. 97-217, at 1 (filed Jan. 8, 1998)("CTN supports, in principle, the provision of two-way services in the

2.5 GHz band") [hereinafter cited as "CTN Comments"]; Comments of Gulf Coast MDS Service Company, MM Docket No. 97-217, at 2 (filed Jan. 8, 1998) ("Gulf Coast supports the concept that licensees should be allowed to utilize the MDS/ITFS spectrum with as much flexibility as possible for one-way and two-way applications as technology permits and market requirements dictate."); Comments of Wireless One of North Carolina, L.L.C., MM Docket No. 97-217, at 1 (filed Jan. 8, 1998)("WONC supports the revisions to the Commission's Rules proposed in the Petition for Rulemaking submitted on March 14, 1997.")[hereinafter cited as "Wireless One Comments"); Comments of the San Francisco-San Jose Educator/Operator Consortium, MM Docket No. 97-217, at 3 (filed Jan. 8, 1998)("The Consortium applauds the Commission's far-reaching proposals for implementing two-way ITFS and MDS services.")[hereinafter cited as "San Francisco/San Jose Consortium Comments"]; Comments of Hispanic Information and Telecommunications Network, MM Docket No. 97-217, at 1 ("[HITN] shares with the Commission the belief that these amendments can enhance the range and depth of educational service which ITFS can offer to the public, especially through the capability to provide Internet access to schools, and through other two-way educational telecommunications services which may emerge.")[hereinafter cited as "HITN Comments"]; Comments of Instructional Telecommunications Foundation, Inc., MM Docket No. 97-217, at 3 (filed Jan. 8, 1998)("ITF generally is supportive of the technical proposals which the Commission has set forth")[hereinafter cited as "ITF Comments"]; Comments of the University of Maryland System, MM Docket No. 97-217, at 2 (filed Jan. 8, 1998)("The University and its constituent schools support the Commission's proposal to change MDS and ITFS from essentially one-way, point-to-multipoint video transmission services to flexible services in which licensees and ITFS excess capacity lessees may offer either one-way or two-way services employing digital technologies and cellular system configuration.")[hereinafter cited as "Maryland Comments"]; Comments of the Nat'l Telephone Cooperative Ass'n, MM Docket No. 97-217, at 2 ("NCTA supports the use of MDS for two-way communications services."); Comments of the Alliance of MDS Licensees, MM Docket No. 97-217, at 2 (filed Jan. 8, 1998)("[Commenters] applaud the initiative to make usage of the MDS and ITFS channels more flexible, thus opening up new opportunities for two-way applications and other non-video based usages of this band")[hereinafter cited as "MDS Licensee Comments]; Comments of Next Level Systems, MM Docket No. 97-217, at 1 (filed Jan. 8, 1998)("NextLevel supports the concept of two-way transmission on MDS/ITFS frequencies as both technologically sound and in the public interest.")[hereinafter cited as "NextLevel Comments]; Comments of Spike Technologies, MM Docket No. 97-217, at 2 (filed Jan. 8, 1998)("Permitting the delivery of advanced services such as high-speed Internet access, telephony, video conferencing and data connectivity over ITFS/MDS channels is critical if wireless operators are to remain viable competitors in what is now a dynamic and fiercely competitive marketplace.")[hereinafter cited as "Spike Comments"]; Comments of BellSouth Corp., *et al.*, MM Docket No. 97-217, at 15 (filed Jan. 8, 1998)("When it comes to harnessing new technologies and translating technological advancements into viable and robust services, ITFS licensees and wireless cable operators have no less need for freedom and flexibility than do others in the marketplace.")[hereinafter cited as "BellSouth Comments"; Comments of EDX Engineering, Inc., MM Docket No. 97-217, at 1 (filed Dec. 9, 1997)[hereinafter cited as "EDX Comments"]. Joint

This wide-ranging support is not surprising, for the Petition that led to the *NPRM* was crafted by the 113 Petitioners in response to the evolving needs of both the wireless cable and educational communities after extensive consultation with numerous representatives of each. The Comments submitted by the Petitioners in response to the *NPRM* detail how adoption of the proposed rule changes will permit wireless cable operators to respond to the increasing competitive pressure to provide two-way communications offerings.[4/] And, as the comments filed by Dow, Lohnes & Albertson on behalf of a consortium of some of the most experienced and sophisticated ITFS licensees in the country (collectively, the "DL&A ITFS Parties") confirm:

> With appropriate safeguards, the proposed rule changes would increase the flexibility of ITFS licensees to engage in a variety of two-way voice, video and data communications (including high speed Internet access). This flexibility could be valuable to the delivery of educational services and cost-effective two-way service could enhance the distance learning experience by allowing it to be more truly interactive. Internet access via the 2.5 GHz band could help schools obtain service at costs far less, and speeds far greater, than can now be obtained for many schools.[5/]

The comments submitted in response to the *NPRM* also evidence broad-based support for the principles reflected in the compromise that has been jointly submitted by the National ITFS Association, Inc. ("NIA") and the Wireless Cable Association International, Inc. ("WCA") regarding many of the difficult and all too often divisive issues associated with the leasing of excess ITFS

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Comments of Dallas Community College District, *et al.*, MM Docket 97-217, at 2 (filed Jan. 8, 1998)("The Joint Commenters have consistently lent their support to the concept of two-fixed (sic) ITFS operations . . . .")[hereinafter cited as "Dallas Comments"].

[4/] *See* Comments of the Petitioners, MM Docket No. 97-217, at 2-9 (filed Jan. 8, 1998)[hereinafter cited as "Petitioners Comments"].

[5/] DL&A ITFS Comments, at 3.

capacity for commercial purposes (the "NIA/WCA Joint Proposal"). Although the NIA/WCA Joint Proposal was not finalized until just prior to the deadline for filing initial comments in response to the *NPRM* and thus is not directly addressed by many of the commenting parties, a review of the comments demonstrates that the NIA/WCA Joint Proposal reflects an appropriate settlement that can and should be embraced by the Commission in full. Indeed, several of the parties submitting suggestions in response to the *NPRM* specifically cited to the ongoing negotiations between the NIA and WCA and acknowledged their support for any settlement ultimately reached between the two organizations.[6/]

Finally, the vast majority of those addressing the issue have agreed with the Petitioners and the NIA/WCA Joint Proposal that the Commission must implement innovative application processing procedures that will expedite the deployment of advanced technologies and avoid the application backlogs that have consistently plagued the wireless cable industry for the past fifteen years. Whatever rules are adopted in this proceeding must reflect a simple reality – wireless cable is competing in a marketplace populated with a wide array of consumer choices. If wireless cable cannot meet consumer demand for new and innovative services in a rapid and cost-effective manner, consumers have a number of alternative service providers available to them. Unfortunately, a handful of commenting parties have proposed a variety of self-serving rules that, if adopted, would effectively preclude wireless cable from serving as a viable competitive force in the marketplace due to the resulting delays in deployment of new facilities. Were that to happen, not only will consumers

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[6/] *See, e.g.*, ITF Comments, at 12 ("Assuming that no acceptable compromise has been achieved by the deadline for reply comments in this proceeding, ITF will set forth a full set of recommendations for the revision of Section 74.931 to update it for the digital age."); DL&A Comments, at 13-16; P&C Comments, at 4.

suffer, but so will the ITFS community that has largely come to rely upon wireless cable for financial and other support.

In the interest of brevity, the Petitioners will not devote any substantial portion of this pleading to recounting the support for their views (as expressed in the Petition and in their initial Comments) contained within the record -- the record speaks for itself. Nor will the Petitioners address in detail those proposals superseded by the NIA/WCA Joint Proposal.[7/] Rather, the remainder of this pleading will be devoted to refuting the anti-competitive contentions of WebCel, addressing the Cellular Phone Taskforce's filing and responding to the issues raised by those commenting parties who support the objective of affording MDS and ITFS licensees greater flexibility, but have expressed concerns regarding the specifics of the proposed rules.

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[7/] *See supra* note 6.

## II. DISCUSSION.

### A. Neither WebCel Nor The Cellular Telephone Task Force Has Presented Any Cogent Reason For The Commission To Refrain From Amending Its Technical Rules To Facilitate More Flexible Spectrum Use.

#### *1. The Commission Should Reject WebCel's Transparent Efforts To Artificially Boost LMDS Auction Values.*

Doing little more than rehashing arguments that have already been soundly rejected in the *NPRM*,[8/] WebCel once again seeks to have the Commission insulate WebCel from competition for financing and for marketplace acceptance by keeping MDS and ITFS licensees hamstrung with obsolete technical rules. Just as the Commission did in the *NPRM*, it should give no credence to WebCel's transparently anti-competitive efforts.

Stripped of its rhetoric and inaccuracies, WebCel's filing argues that the Commission should ignore the public interest benefits of amending the MDS and ITFS rules to promote routine flexible use in order to bolster the value of the LMDS spectrum that will be auctioned later this month. Yet, as the Petitioners have previously noted, WebCel was hardly worried about reduction of the national debt.[9/] Rather, WebCel was attempting to bolster its own efforts at fund-raising -- efforts that apparently have failed.[10/] Yet, WebCel's fund-raising difficulties are of no relevance to the question

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[8/] *See NPRM*, at ¶ 10.

[9/] *See* Reply Comments of Petitioners, RM-9060, at 13 (filed May 29, 1997)[hereinafter cited as "Petitioners' PN Reply Comments"]. While WebCel attempts to blame "significant marketplace uncertainties" for its apparent difficulties in securing funding, it may just be that the financial markets have fully evaluated the potential of LMDS and found it wanting. *See* Letter from Glenn B. Manishin, counsel to WebCel, to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, CC Docket No. 92-297 (dated Jan. 27, 1998).

[10/] Just last Friday, the Commission released a *Public Notice* announcing that while 138 bidders have qualified to participate in the LMDS auction, WebCel did not deposit an upfront

at hand — whether the proposed rules advance the public interest in strong, viable MDS and ITFS services.

The fundamental flaw in WebCel's argument is that it wrongly presumes that the Commission's objective should be to bolster LMDS spectrum valuation by limiting the supply of other spectrum that can be used flexibly.[11/] Contrary to WebCel's arguments, the Commission should not, and cannot, ignore the benefits that will accrue to the public through amending the MDS and ITFS rules to more readily permit licensees to implement advanced services and to make more productive use of their spectrum.[12/]

As a general proposition, it is beyond peradventure that affording licensees flexibility in spectrum use is in the public interest. As former Chairman Hundt noted when he testified before the House Subcommittee on Telecommunications, Trade and Consumer Protection last year:

> We study history so as not to repeat its failures. Spectrum policy, unfortunately, teaches us many lessons. One important lesson is that static definitions of use, whether for service or technology, are doomed to fail and will need to be changed. In nearly every service the FCC authorizes, licensees come back to the Commission to ask permission to change something. This is not ancient history, but is occurring even now, as the old regime continues its sway over Commission thinking.
>
> Last week, Multipoint Distribution Service (MDS) licensees petitioned the Commission to gain additional flexibility so that they could provide two-way services. Why is this necessary? Shouldn't flexible use be automatic? If MDS licensees want to provide high speed two-way services, the public needs the opportunity to receive these services. This will provide competition to the cable

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payment and has therefore been disqualified. *See* "Auction of Local Multipoint Distribution Service (LMDS) Licenses," *Public Notice*, DA 98-230 (rel. Feb. 6, 1998)[hereinafter cited as "*LMDS Public Notice*"].

[11/] *See id.*, at 6.

[12/] *See* Petition, at 4-18; Petitioners Comments, at 2-15. *See also supra* note 3.

> companies and telephone companies who promise to provide the same services. We must reject the 1945 principles that would administratively evaluate the relative costs of wireless and wireline provision of these services. Rather, we need to allow licensees the flexibility to provide the high speed, high quality services that consumers demand.[13/]

While WebCel is advocating that flexible use should be available only to those who secure authorizations at auction, WebCel ignores that the Commission's spectrum flexibility policies are independent of the mechanism employed to award authorizations. As Gregory L. Rosston and Jeffrey Steinberg have made clear in their seminal work on flexible use, the Commission should be affording all licensees with the ability to employ their spectrum flexibly, and should not deny any one group of licensees flexible use rules in order to protect some other group of licensees.[14/]

It is certainly significant that WebCel makes no mention whatsoever of the Commission's consistent willingness to amend its rules to provide licenses with increased flexibility *regardless of*

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[13/] Statement of Reed E. Hundt on Spectrum Management Policy before the Subcommittee on Telecommunications. Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives at 11-12 (Feb. 12, 1997). Similarly, speaking in support of flexible use, Michele Farquhar, then Chief of the Wireless Telecommunications Bureau, noted:

> In nearly every service we authorize, licensees have come back to the Commission to ask to change their authorized services, or technical restrictions, or the amount of spectrum they seek to employ. Last week, for example, Multipoint Distribution Service or "MDS" licensees petitioned the Commission to gain additional flexibility so that they could provide two-way services. The same process occurred with PCS, where we neglected to permit fixed services to operate on this spectrum. And it occurred in IVDS, where we awarded additional flexibility after the first auction and are facing new petitions seeking even more flexibility.

"Putting the Key Principles of Spectrum Policy Into Practice," Keynote Address by Michele C. Farquhar before the Telecommunications Reports "Next Generation Wireless" Conference, at 8-9 (Feb. 13, 1997).

[14/] Rosston and Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest," *F. Comm. L. J.* 87, 100 (Dec. 1997).

*whether their licensees were secured at auction.* The Commission's rationale for permitting IVDS licensees to provide mobile services even after it had auctioned IVDS authorizations is instructive, for it illustrates precisely why the Commission should afford MDS and ITFS licensees flexible use over the objections of WebCel. At the time the Commission expanded the flexibility afforded IVDS licensees, it expressly recognized that even once licenses have been auctioned for a given service, "[t]he public interest requires, however, that we retain the discretion and responsibility to modify our service rules as the industry continues to evolve."[15/]

The Commission's post-auction treatment of IVDS is consistent with the Commission's regulatory approach to other services. For example, long after the Commission issued mobile authorizations to Cellular Radio Service, Personal Communications Services ("PCS"), Specialized Mobile Radio Service, paging, 220 MHz and for-profit interconnected business radio services providers using a combination of comparative hearings, lotteries and auctions, the Commission granted all licensees in those services the flexibility to offer fixed wireless services in addition to mobile services.[16/] In so doing, the Commission specifically rejected arguments that PCS licensees should be afforded the greatest flexibility because they received their licenses through the auction process.[17/] Similarly, the Commission expanded the flexibility afforded all PCS licensees when it ruled that all broadband licensees (including those that had already received authorizations) could

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[15/] *Amendment of Part 95 of the Commission's Rules To Allow Interactive Video and Data Service Licenses To Provide Mobile Service To Subscribers,* 10 FCC Rcd 4981, 4982 (1995).

[16/] *Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8973-77 (1996).

[17/] *See id.* at 8973.

engage in geographic partitioning and spectrum disaggregation.[18/] Just three months ago, the Commission established a new regulatory regime for the 39 GHz band that affords incumbents, as well as future auction winners, the same degree of flexibility in their use of the spectrum.[19/] And, of course, when the Commission issued its July 10, 1996 *Declaratory Ruling and Order* establishing policies governing the use of digital modulation by MDS and ITFS licensees, it made no effort to discriminate in favor of those licenses that were issued as a result of the MDS auction.[20/]

As these recent precedents illustrate, the Commission can and should provide licensees with increased technical flexibility wherever it can, without regard to whether the licenses were issued by comparative hearing, lottery or auction. Those bidding in spectrum auctions (as well as those investing in bidders) have long been on notice that the Commission will not deprive licensees flexibility simply because they did not participate in an auction, or participated in an auction prior to the award of flexibility. That 138 bidders have submitted more than one quarter of a billion dollars in upfront payments to participate in the LMDS auction speaks volumes -- while WebCel

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[18/] *See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees and Implementation of Section 257 of the Communications Act: Elimination of Market Entry Barriers,* 11 FCC 2nd, 21831, 21843-44, 21858-59, FCC 96-474, ¶¶ 13-18, 46 (rel. Dec. 20, 1996). In so doing, the Commission rejected arguments by rural telephone companies, which had previously been the only PCS licensees permitted to engage in partitioning, for special protection from competition in securing partitioned service areas, finding that the public interest benefits of allowing all licensees to engage in partitioning outweighed any particular benefit to rural telephone companies. *See id.* at ¶¶ 21,843-44.

[19/] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands,* FCC 97-391, ET Docket No. 95-183, at ¶¶ 18-26 (rel. Nov. 3, 1997).

[20/] *See Request For Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18,839 (1996)[hereinafter cited as "*Digital Declaratory Ruling*"].

may not be able to raise funding for LMDS, others are prepared to seek LMDS authorizations and compete in a marketplace where all participants can enjoy the benefits of the Commission's flexible use policy.[21/]

Finally, but perhaps most importantly, WebCel's argument is fatally flawed by its erroneously factual predicate – that when the Commission conducted its auction for available MDS frequencies, winning bidders were restricted to providing a one-way that competes with incumbent cable operators.[22/] WebCel attempts to ignore that the Commission's rules at the time of the MDS auction, as now, afford MDS licensees the flexibility to provide "any kind of communications service."[23/] Moreover, WebCel attempts to ignore that in the 1995 *Report and Order* in which the Commission first authorized the use of competitive bidding for awarding MDS authorizations, Paragraph 59 of that decision clearly stated that it would not restrict MDS licensees to the one-way transmission of video programming.[24/] Similarly, WebCel attempts to ignore Paragraphs 19-20 of

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[21/] *See LMDS Public Notice.*

[22/] WebCel Comments, at 4-5.

[23/] 47 C.F.R. §21.903(b). That WebCel would totally ignore this provision in crafting its argument is strange, for it was specifically discussed in the Petition, along with Commission decisions specifically providing that MDS licensees are not limited to the provision of video entertainment programming. *See* Petition, at 21-23.

[24/] *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589, 9619 (1995)[hereinafter cited as "*MDS Auction Order*"]. The Commission warned prospective bidders that they may need to apply for waivers of certain MDS technical rules in order to provide other services. *See id.* The Petition envisions a regulatory scheme under which the Commission can avoid the individualized decision making associated with waiving rules by regularizing rules and procedures for the processing of applications for other uses.

the *Memorandum and Order on Reconsideration* in that proceeding, where the Commission further provided that:

> previous MDS rulemakings have also noted that operators should be afforded the flexibility to provide other services. *See, e.g., In the Matter of Revisions to Part 21 of the Commission's Rules*, 2 FCC Rcd 4251, 4255 (1987) ("We believe a similar flexible approach is particularly appropriate to MDS . . . . In the non-entertainment market, MDS may compete with short-haul microwave, coaxial cable, Digital Termination Systems, fiber optic cable and fixed satellites."); *see also, Report and Order in the Matter of Parts 1, 2, 21, and 43 of the Commission's Rules*, 45 FCC Rcd 616, 619 n.6 (1974) ("MDS is not limited to television transmission and should be capable of many diverse forms of transmission such as the omnidirectional distribution of high speed computer data, audio, control signal, facsimile, etc.").
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> 20. In the *MDS Report and Order* we changed none of our rules regarding the use of MDS frequencies, and we do not do so here. We will allow alternative uses other than wireless cable video transmission if the applicant can satisfy MDS technical rules or adequately support waivers of those rules. We will examine waiver requests for these uses on a case by case basis. However, we will not grant waivers of technical rules where we find that applicants merely are attempting to warehouse these frequencies. We emphasize that any party entering the MDS auction should do so with the expectation that all station license applications must protect against harmful electrical interference to incumbent MDS operations as well as ITFS receive sites and the service areas associated with channel leases.[25/]

And, WebCel attempts to ignore that the Commission had previously authorized MDS licensees to utilize spectrum in the 2.5 GHz and 18 GHz bands for return paths.[26/]

In a myopic effort to rationalize its position, notwithstanding the fact that the Commission has clearly permitted MDS licensees to engage in non-video services, WebCel suggests that the $216.3 million in total high bids in the MDS auction reflects that bidders were only contemplating

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[25/] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 13,821, 13,825 (1995).

[26/] *See Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band,* 6 FCC Rcd 1270 (1991).

one-way use.[27] For WebCel to leap to that conclusion based on the amount bid is, at best, disingenuous. While that amount was less than the Commission realized for some of its other auctions of flexible use spectrum, WebCel is well-aware that the difference can largely be explained by the fact that because of the heavily encumbered nature of the MDS spectrum prior to the auction, in most BTAs the vast majority of MDS channels were already licensed and the auction winner received only the "table scraps." Nonetheless, the 1.2¢ per MHz/pop nationwide price paid for MDS spectrum (even without adjusting the MDS auction prices for incumbent licenses encumbering the spectrum) is more than six times the 0.18¢ per MHz/pop nationwide price for WCS spectrum. Yet, there was never any question that WCS would be a flexible use service.[28] Thus, WebCel cannot be heard to argue that the pricing of MDS spectrum at auction is evidence that only one-way spectrum was being auctioned.

Finally, given that MDS auction participants were bidding for spectrum that could be used "for any communications service," it is absurd for WebCel now to suggest that the Commission "should either reject its proposed grant of unlimited two-way services or devise a way whereby the flexibility right can be valued and paid for."[29] Such a solution would not only be unworkable as a

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[27] *See* WebCel Comments, at 3.

[28] *See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Services,* 12 FCC Rcd 10,785, 10,841-65 (1997) (permitting flexible use and operation of WCS facilities subject to compliance with technical limitations and international coordination requirements).

[29] WebCel Comments, at 2. Both because the public interest is served by flexible use and because MDS auction participants were bidding for spectrum that the Commission had indicated could be used flexibly, WebCel's argument that the grant of the Petition would result in a financial windfall is of no moment. *Id.* at 2.

practical matter, but would require MDS auction winners to pay again for that which they have purchased once already.

In short, WebCel's arguments are fatally flawed by its failure to acknowledge either the regulatory environment that existed when the MDS auction was conducted or the Commission's ongoing responsibility to adjust MDS and ITFS service rules to meet changing public interest demands, without regard for potential adverse impacts on LMDS auction revenues. It is perhaps understandable that WebCel – whose failed LMDS fund-raising efforts are a matter of record before the Commission – would want wireless cable crippled to make LMDS appear a more viable alternative. It would be unconscionable, however, for the Commission to go along.

2. *This Is Not The Appropriate Venue For Determining Whether The Commission's RF Emission Guidelines Adequately Protect Those Who Are Unusually Susceptible to RF Emissions.*

As part of an ongoing campaign to reopen the Commission's recently-concluded efforts to establish a consistent and coherent approach to regulating radiofrequency ("RF") emissions, the Cellular Phone Taskforce has filed a one-paragraph comment that "opposes the introduction of any more new, or the expansion of existing digital cellular networks of any type" due to concerns for the health effects of RF emissions.[30/] While the Cellular Phone Taskforce provides the Commission with no discussion whatsoever regarding the potential impact of adoption of the specific rules proposed in the *NPRM*, it references comments it submitted in ET Docket No. 93-62, the Commission's omnibus RF emissions proceeding, that call for revisions to the Commission's RF restrictions to protect those who claim to be unusually susceptible to RF emissions.

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[30/] *See* Comments of Cellular Phone Taskforce, MM Docket No. 97-217, at 1 (filed Dec. 5, 1997).

The short answer to the Cellular Phone Taskforce is that ET Docket No. 93-62 is the appropriate proceeding for resolving its concerns. The Commission initiated ET Docket No. 93-62 nearly five years ago to revisit the guidelines and methods it had previously used to evaluate the environmental effects of RF radiation.[31/] In addition to the Cellular Phone Taskforce, over seventy parties filed comments in response to the Commission's initial *RF NPRM*, and thirty parties participated in the reconsideration phase of that proceeding – representing service providers, industry associations, expert federal agencies, standards bodies, manufacturers, scientists and private citizens. A *Report and Order* updating the Commission's RF emission rules was adopted in 1996, and a *Memorandum Opinion and Order* further refining and clarifying those rules was adopted just months ago.[32/]

As is recognized by the *NPRM*, MDS and ITFS licensees — like all Commission licensees — are subject to the RF emission requirements developed in ET Docket No. 93-62.[33/] The

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[31/] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rulemaking*, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993) [hereinafter cited as "*RF NPRM*"].

[32/] See *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 FCC Rcd 15123 (1996) [hereinafter cited as "*RF Report and Order*"], *on reconsideration, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-303 (released Aug. 25, 1997)[hereinafter cited as "*RF Reconsideration Order*"]. Since then, the Office of Engineering and Technology has released an updated OET Bulletin 65, which provides additional practical guidance for licensees seeking to comply with the Commission's RF emission rules.

[33/] *See NPRM*, at ¶ 27 n.30 (noting that the *RF Reconsideration Order* would apply to MDS and ITFS licensees). MDS and ITFS outbound transmissions are already subject to extensive RF regulation resulting from the RF emission proceeding (47 C.F.R. § 1.1307) and the *NPRM* proposes that MDS and ITFS return paths be subject to RF emission rules identical to those adopted for LMDS. *See NPRM*, at ¶ 27.

Commission has found that these requirements, based on the recommendations of expert agencies and standards bodies, "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands."[34/] Nonetheless, the Cellular Phone Taskforce has submitted subsequent filings in ET Docket No. 93-62 that remain pending,[35/] filings that take issue with the Commission's rejection of a variety of proposals that had been advanced by the Cellular Phone Taskforce.[36/]

Under these circumstances, the appropriate approach for the Commission is to proceed with the adoption of the RF restrictions proposed in the *NPRM*, subject to whatever additional proceedings (if any) may be appropriate as a result of the Cellular Phone Taskforce's filings in ET Docket No. 93-62. Particularly, given the Commission's recent rejection of the positions being advocated by the Cellular Phone Taskforce, the public interest will not be served by delaying the

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[34/] *See RF Reconsideration Order,* at ¶¶ 29-39.

[35/] *See, e.g.,* "Appeal" of Cellular Phone Taskforce, ET Docket No. 93-62 (filed Oct. 6, 1997); Petition of Cellular Phone Taskforce for Reconsideration, ET Docket No. 95-177 (filed Nov. 28, 1997); Ex Parte Comments of Cellular Phone Taskforce, ET Docket No. 93-62 (filed Dec. 29, 1997).

[36/] The Commission rejected the Taskforce request that emission standards be stricter on the "controversial" basis that "certain individuals might be 'hypersensitive' or 'electrosensitive,'" opting instead for requirements recommended by expert standards bodies and federal agencies. *RF Reconsideration Order*, at ¶¶ 26, 31. The Commission also rejected the Taskforce's unsubstantiated arguments that extending the deadline for compliance with RF emission requirements "will allow the proliferation of facilities that will harm and discriminate against individuals who are 'electrosensitive,'" and that "'thousands of people' in New York City are suffering from 'radiation' as a result of PCS technology." *See RF Reconsideration Order*, at ¶¶ 107, 110.

inauguration of advanced technologies by MDS and ITFS licensees pending further decisions in ET Docket No. 93-62 or a *de novo* review of the Cellular Phone Taskforce's concerns here.

### B. There Is Widespread Support In The Record For Adoption Of The Expedited Licensing Procedures Advocated By The Petitioners.

In their Comments in response to the *NPRM*, the Petitioners emphasized that if wireless cable is to become a commercially viable service and continue its financial support of the vast majority of the ITFS stations in operation, it is essential that the Commission craft MDS and ITFS rules that will permit the rapid authorization and deployment of advanced technologies, without the application processing backlogs that have delayed service in the past. While a very small minority of ITFS licensees who already have their authorizations continue to resist efforts to expedite the processing of applications filed by others who are not so fortunate (and invariably do so without any discussion of the adverse impact of application backlogs on the deployment of new ITFS services),[37/] the vast majority of the commenting parties concurred with the Petitioners that rule changes are necessary to avoid processing delays.

The Commission should note that while the *NPRM* tentatively rejects the Petitioners' proposals to expedite application processing because of concerns over the impact on the ITFS community,[38/] the ITFS community itself is strongly supportive of the Petitioners' approach.[39/] For

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[37/] A prime example is the University of Maryland ("Maryland"), which in cursory fashion indicates that it opposes a rolling one-day filing window, opposes the automatic granting of applications if they are unopposed, and supports a 120 day period for petitions to deny advanced technology applications. *See* Maryland Comments, at 4. Yet Maryland does not address at all the significant delays that this approach will cause in the licensing of advanced technology facilities.

[38/] *See NPRM*, at ¶¶ 46-53.

[39/] Of course, so too is the wireless cable community. *See, e.g.*, WONC Comments, at 6-7.